

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENITO CHRISTOPHER VASQUEZ,

Defendant-Appellant.

UNPUBLISHED

August 21, 2003

No. 239304

Kalamazoo Circuit Court

LC No. 00-000668-FC

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

Defendant Benito Vasquez appeals as of right from his jury trial convictions for first-degree home invasion,¹ felonious assault,² and possession of a firearm during the commission of a felony.³ The trial court sentenced Vasquez to 160 months to 20 years' imprisonment for the home invasion conviction, 32 months to 48 months for the felonious assault conviction, and 2 years for the felony-firearm conviction. We affirm.

I. Basic Facts And Procedural History

On the night of April 15, 2000, Vasquez arrived at his ex-wife's house armed with a backpack full of weapons, ammunition, spray paint, and duct tape. He shot his ex-wife's boyfriend three times, killing him, and then dragged his ex-wife by her hair into the basement where he stripped off her clothes, tied her up, and threatened and terrorized her with guns and a knife for approximately six hours. Throughout the night the police surrounded the house and communicated with Vasquez by telephone, while Vasquez's daughters pleaded with him over the telephone not to harm their mother. By morning, Vasquez grew tired and the police and his ex-wife convinced him to release her.

¹ MCL 750.110a(2).

² MCL 750.82.

³ MCL 750.227b.

Vasquez was charged with open murder,⁴ kidnapping,⁵ first-degree home invasion,⁶ felonious assault,⁷ and felony-firearm⁸ for the assault against his ex-wife. He was also charged with felonious assault and felony-firearm for firing his gun at a neighbor who had tried to intervene. At trial, Vasquez argued that he was psychologically damaged and mentally ill and that his illness was fueled by his ex-wife's relationship with another man. Vasquez also asserted that he shot his ex-wife's boyfriend in self-defense. The prosecution maintained that Vasquez was not mentally ill, nor legally insane, but that he was rational and lucid throughout the entire ordeal, and that he meticulously planned the events of that evening.

The jury found Vasquez guilty of first-degree home invasion, and felonious assault and felony-firearm against his ex-wife. The jury acquitted him on the kidnapping charge and deadlocked on the charge of murder and the charges of felonious assault and felony-firearm against the neighbor. Subsequently, Vasquez pleaded guilty to second-degree murder and was sentenced to 27½ to 50 years in prison. The felonious assault and felony-firearm charges brought for the assault on the neighbor were dismissed as part of the plea agreement.

II. Motions For Mistrial

A. Standard Of Review

Vasquez argues that the trial court abused its discretion by denying two separate motions for mistrial after the prosecutor deprived him of a fair trial by introducing improper MRE 404(b) “bad character” evidence into two separate lines of questioning. According to Vasquez, the errors were more prejudicial than probative, violating MRE 403, and were not harmless because the jury was unable to reach a verdict on his open murder charge, and acquitted him on the kidnapping charge, indicating that the jury may not have convicted him on the charges for first-degree home invasion, felonious assault, and felony-firearm, had it not heard this tainted testimony. We review the trial court's decision to deny a motion for mistrial for an abuse of discretion.⁹ An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias.¹⁰

⁴ MCL 750.316.

⁵ MCL 750.349.

⁶ MCL 750.110a(2).

⁷ MCL 750.82.

⁸ MCL 750.227b.

⁹ *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

¹⁰ *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000).

B. Elements Of Prosecutorial Misconduct

To establish prosecutorial misconduct, a defendant must demonstrate that he or she was denied a fair and impartial trial.¹¹

C. Other Acts Evidence

Generally, all relevant evidence is admissible, and irrelevant evidence is inadmissible.¹² MRE 401 defines relevant evidence as evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence.” Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence.¹³

MRE 404(b) states that “evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Reversal is not warranted if an evidentiary error is “harmless,” i.e., if it does not affect a substantial right.¹⁴ “A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant . . . and impairs his ability to get a fair trial.”¹⁵

After Vasquez’s ex-wife testified on direct examination that he had used cocaine,¹⁶ the defense moved for a mistrial based on prosecutorial misconduct and the trial court denied the motion. While the comments made by Vasquez’s ex-wife and by the prosecutor regarding Vasquez’s cocaine use were improper, we conclude that the error was harmless and Vasquez was not denied a fair and impartial trial. The prosecutor did not specifically ask a question concerning Vasquez’s cocaine use; rather, his ex-wife volunteered the information. A voluntary,

¹¹ *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

¹² MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998).

¹³ MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000).

¹⁴ MRE 103(a); *People v Ullah*, 216 Mich App 669, 676; 550 NW2d 568 (1996).

¹⁵ *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

¹⁶ The questioning was as follows:

Q. [Prosecutor] Okay. So you didn’t leave [Vasquez] in 1985?

A. No. I went into labor with my daughter, and he was high on cocaine in the hospital when I delivered her.

Q. He was high on cocaine at the hospital when you delivered Stacy?

A. Yes.

unresponsive answer by a witness to a proper question, even one in which the defendant's criminal past is mentioned, is not error, and is not cause for granting a mistrial.¹⁷

And, while the trial court acknowledged that the prosecutor did not "need to further emphasize" the improper comment by repeating it, it immediately instructed the jury to disregard the reference made to defendant's cocaine use. A defendant is not denied a fair trial where a prosecutor's improper remarks could have been, or actually were, cured by the trial court's proper jury instructions.¹⁸ Thus, the trial court's prompt and proper jury instructions cured any prejudice caused by the improper remarks.

Finally, any error that occurred as a result of this testimony was harmless. Vasquez's addiction to both prescription and illegal drugs was discussed throughout the trial by defense counsel and by Vasquez himself. And defense counsel stated that Vasquez's addictions were "important for this case." Accordingly, the trial court did not abuse its discretion in denying Vasquez's motion for a mistrial.

The second line of questioning Vasquez challenges is the prosecution's cross-examination of Vasquez's mother, in which she testified that Vasquez was a childhood bully, "picked on" his siblings, and had a "mean and angry streak" when he was young. The prosecutor also asked Vasquez's mother about an incident in which Vasquez held a knife to his sister and an incident where Vasquez was kicked out of their house. Vasquez's mother denied knowing about the incident with the knife and did not explain why Vasquez was kicked out of the house. Vasquez then moved for a mistrial based on prosecutorial misconduct, which the trial court subsequently denied.

We conclude that the mother's testimony regarding Vasquez's childhood was proper and, although the prosecutor's attempt to elicit specific other acts testimony was improper, it was harmless. Therefore, Vasquez was not denied a fair trial and the trial court did not abuse its discretion in denying his second motion for a mistrial. In *People v VanderVliet*,¹⁹ the Michigan Supreme Court held that evidence of other acts is admissible if (1) it is relevant; (2) it is offered for a proper purpose (not to prove that the defendant acted in conformity with his character); (3) the probative value is not substantially outweighed by unfair prejudice; and (4) upon request, the trial court provides a limiting instruction.

Here, under requirements (1) and (2) above, the testimony regarding Vasquez's difficult childhood was relevant and offered for a proper purpose. The credibility of witnesses is a material issue and evidence which shows bias or prejudice of a witness is always relevant.²⁰ On

¹⁷ *People v Kelsey*, 303 Mich 715, 717; 7 NW2d 120 (1942); *People v VonEverette*, 156 Mich App 615, 622-623; 402 NW2d 773 (1986); *People v Williams*, 114 Mich App 186, 198-199; 318 NW2d 671 (1982).

¹⁸ *People v Solak*, 146 Mich App 659; 382 NW2d 495 (1985).

¹⁹ *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993).

²⁰ *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995).

direct examination Vasquez's mother testified that although he was a "difficult" child, he was generally successful in life until his wife decided to divorce him. And she stated that Vasquez loved his wife, worked hard and focused on his family, was a financial success, a good provider, very outgoing with people, and good with his children. In order to counter this testimony on cross-examination, the prosecution made an effort to impeach the witness' credibility by probing further into Vasquez's "difficult" childhood and eliciting testimony that he was a bully as a child, "picked on" his siblings and the neighborhood children, that he had a "mean and angry streak" when he was young, and generally that he had a troubled past. This testimony was relevant and was offered for the proper purpose of impeaching any testimony that Vasquez was generally successful in life until his wife divorced him, at which point his life went "downhill."

Under requirement (3) above, "unfair prejudice" does not mean "damaging."²¹ Any relevant evidence will be damaging to some extent. Rather, unfair prejudice exists when there is a tendency that the jury will give the evidence undue or preemptive weight or when it would be inequitable to allow use of the evidence.²² Here, the testimony concerning Vasquez's childhood acts of "picking on" his siblings and neighbors, and being a bully may have been "damaging." But the testimony was not "inflammatory." It is doubtful that the jury gave this testimony undue weight in finding Vasquez guilty of first-degree home invasion, felonious assault, and felony-firearm. Thus, the testimony was more probative than prejudicial, as it presented a more balanced view of Vasquez's past. And it is doubtful that it was given undue weight by the jury. Finally, under requirement (4) above, no limiting instructions were requested, and thus none were given. We conclude that Vasquez was not denied his right to a fair and impartial trial based on the testimony regarding his difficult childhood.

The prosecutor's attempt to elicit testimony from Vasquez's mother regarding Vasquez holding a knife to his sister or the events leading to Vasquez being kicked out of his house was improper, but harmless. Despite the prosecutor's attempts, Vasquez's mother did not in fact testify to such acts. Although the prosecutor's questioning approached the introduction of improper MRE 404(b) evidence of "other crimes, wrongs, or acts," the trial court properly found that it did not cross the line, for the evidence was not actually introduced: Vasquez's mother did not testify that Vasquez ever held a knife to his sister nor did she explain why she kicked him out of her house. The trial court properly instructed the prosecutor to "move on" before any such improper MRE 404(b) testimony was introduced. Thus, the prosecutor's attempts to introduce improper evidence constituted harmless error and Vasquez was not denied his right to a fair and impartial trial. We conclude the trial court did not abuse its discretion by denying Vasquez's second motion for a mistrial.

We note that Vasquez states that the above two lines of questioning were brought in the context of a trial that was "already permeated" with improper MRE 404(b) testimony regarding his bad behavior toward his family and that such testimony "[filled] many pages of the trial transcript." However, an appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory

²¹ *Id.* at 75.

²² *Id.* at 75-76.

treatment with little or no citation of supporting authority.²³ Thus, it is unnecessary to address any possible improper MRE 404(b) evidence that Vasquez has not properly presented and has only referred to incidentally.

III. Sentencing

A. Standard Of Review

We review the trial court's determination regarding the existence of a reason or factor warranting departure for clear error.²⁴ We review de novo the determination that a particular factor is objective and verifiable.²⁵ We review a trial court's determination that objective and verifiable factors present in a particular case constitute a substantial and compelling reason to depart from the statutory minimum sentence for an abuse of discretion.²⁶ An abuse of discretion in sentencing occurs when the trial court chooses an outcome falling outside the reasonable and principled range of possible outcomes.²⁷

B. The Sentencing Guidelines

Vasquez argues that the trial court abused its discretion by deviating upward from the sentencing guidelines applicable to his convictions for first-degree home invasion and felonious assault. The sentencing guidelines range for Vasquez's home invasion conviction was 57 to 95 months and the trial court sentenced him to 160 months to 20 years. The sentencing guidelines range for Vasquez's conviction for felonious assault was 5 to 23 months and the trial court sentenced him to 32 to 48 months. According to Vasquez, the trial court failed to sufficiently identify substantial and compelling reasons for departing from the guidelines and any reasoning that the trial court did provide was undermined by the mitigating factor of Vasquez's mental illness.

We first note that, because Vasquez committed his crimes in April 2000, the legislative sentencing guidelines apply to this case.²⁸ Under these guidelines, a trial court may only depart from the guidelines if it has substantial and compelling reasons to do so, and states those reasons on the record.²⁹ In addition, the court's reasons for departure must also be objective and verifiable.³⁰ The phrase "objective and verifiable" has been defined to mean that the facts to be

²³ See *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

²⁴ *People v Babcock*, ___ Mich ___, ___ NW2d ___ (Docket No. 121310, issued July 31, 2003), slip op at 18-19.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Babcock*, *supra*, slip op at 23.

²⁸ MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

²⁹ MCL 769.34(3); *People v Daniel*, 462 Mich 1, 9; 609 NW2d 557 (2000).

³⁰ *People v Fields*, 448 Mich 58, 62; 528 NW2d 176 (1995).

considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, the prosecution, and others involved in the case, and must be capable of being confirmed.³¹ Moreover, a court may not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record that the characteristic has been given inadequate or disproportionate weight.³²

C. Vasquez's Mental Condition

Vasquez asserts that there was powerful evidence presented at trial that he was mentally ill on the day of the offenses, and cites testimony from doctors claiming that on the day of the offenses, he was mentally ill; legally insane; suffered from major depression, agitation, a propensity for substance abuse, and suicidal feelings; was psychologically damaged; and had acted on impulse. But, there was also strong evidence from doctors at trial that Vasquez was neither mentally ill nor legally insane, that he was rational, lucid and responsive on the day of the offenses, and that he meticulously planned the events of that evening. The jury considered both of these arguments and still found Vasquez guilty of the offenses in question. In any event, our review is limited to whether there were substantial and compelling reasons stated on the record for the trial court's departure.

D. Factors Supporting A Departure From The Guidelines

At the sentencing hearing, the prosecution stated objective and verifiable factors, which were not adequately considered, or not considered at all, in the scoring of the guidelines. These factors, constituting substantial and compelling reasons to depart, were adopted by the trial court. The following factors were cited by the prosecution as factors not adequately considered by the guidelines. First, Vasquez brought a backpack with him to commit this "home invasion" and "felonious assault" which contained, among other items, three guns, a knife, two hundred rounds of ammunition, and speed loaders. Second, Vasquez shot and killed his ex-wife's boyfriend. Third, Vasquez discharged the gun at a neighbor. Fourth, Vasquez held the gun against his ex-wife, threatening and terrorizing her for approximately six hours, including holding the gun against her "private area" and threatening to shoot her, using a knife to hack off her hair, stripping her naked, forcing her at gunpoint to defecate on herself from fear, tying her down to a futon in a "spread eagle" position using duct tape, punching her in the head, and cutting her arms with a knife in an attempt to cut duct tape off of her wrists. Fifth, the elderly mother of his ex-wife had watched as he dragged her daughter by the hair into the house, after telling her that he already killed one person and had no problem shooting another. Sixth, Vasquez's daughters and his ex-wife's mother waited helplessly for approximately six hours, not knowing if Vasquez would kill her and begging him on the telephone not to hurt her.

³¹ *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991).

³² MCL 769.34.

In addition, factors cited by the prosecution that were not considered in the scoring of the guidelines included that Vasquez placed the police and the neighborhood in an extremely dangerous situation, forcing the police into a standoff throughout the night, and that he had made numerous threats against his ex-wife and her boyfriend, including stating that he was going to shoot him “down like a dog,” before he violated the personal protection order against him, and packed his backpack and went to the house.

We conclude that all of these factors were actions or occurrences that were external to the minds of the judge, Vasquez, and the prosecution; all were capable of being confirmed; and thus all were objective and verifiable.³³ Once this Court determines as a matter of law that the trial court’s stated factors for departure are objective and verifiable, our review is limited to whether the trial court abused its discretion in concluding that the factors constituted substantial and compelling reasons to depart.³⁴ All of the above objective and verifiable factors warranted a departure from Vasquez’s sentences for first-degree home invasion and felonious assault. Therefore, we conclude that the trial court did not abuse its discretion in departing upward from the statutory minimum sentences.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski
/s/ Christopher M. Murray

³³ See *Hill, supra* at 112.

³⁴ *Babcock, supra*, slip op at 18-19.